ROBERT D. McGOLDRICK ET AL.

IBLA 88-126 Decided July 18, 1990

Appeal from a decision of the Oregon State Office, Bureau of Land Management, declaring interests in certain mining claims null and void. OR MC 26511 et al.

Affirmed as modified.

1. Contests and Protests: Government Contests--Mining Claims: Contests--Rules of Practice: Government Contests

   Where a Government contest complaint against a mining claim contains charges which, if proved, would render the claim invalid, and the contestee fails to timely file an answer to the complaint in accordance with Departmental regulations, the allegations of the complaint will be taken as admitted by the contestee and the claim is properly declared null and void.

2. Contests and Protests: Government Contests--Mining Claims: Contests--Rules of Practice: Appeals: Standing to Appeal--Rules of Practice: Government Contests

   When the Government issues a mining claim contest complaint to more than one contestee and subsequently issues a decision declaring the interests in the claim of those contestees null and void for failure to file a timely answer to the complaint, a contestee appealing that decision has no standing to challenge it on the basis of failure properly to serve another contestee, where the appealing contestee has affirmatively alleged that he does not represent the other contestee.

APPEARANCES: Robert D. McGoldrick, Esq., pro se, and on behalf of Full Moon Mining and Exploration Company.

OPINION BY ADMINISTRATIVE JUDGE BURSKI

Robert D. McGoldrick has appealed, on behalf of himself and Full Moon Mining and Exploration Company (Full Moon), from a decision of the Oregon State Office, Bureau of Land Management (BLM), dated October 13, 1987,

declaring interests in the Peggy Nos. 1-4 lode mining claims (OR MC 26511-26514), located within the Colville National Forest, null and void since McGoldrick, Full Moon, and Magma Mining Company (Magma) had failed to file a timely answer to a contest complaint alleging the invalidity of these claims and the charges included therein were deemed admitted. We affirm.

The factual construct of the instant appeal is somewhat convoluted. The four claims involved were originally recorded on October 19, 1979. The location notices of all four claims stated that they were located on July 29, 1971, by Cline E. Tedrow. The letter submitted with the location notices for the claims indicated that recordation was being made on behalf of Full Moon by McGoldrick. The proof of labor for these claims, however, stated that McGoldrick had performed the required annual labor on these claims "for and on behalf of Magma Mining Company and Full Moon Mining and Exploration Company." The only address contained on any of the documents was that of McGoldrick. 1/

Annual proofs of labor were timely filed thereafter. The proofs of labor for calendar years 1980 and 1981 indicated that the assessment work had been performed on behalf of Magma. Thereafter, the proofs of labor indicated that the assessment work had been performed for Magma, as owner, and for Full Moon, as lessee. All of these submissions contained only the address of McGoldrick.

By letter dated September 19, 1985, the Director of Lands and Minerals for the Pacific Northwest Region, U.S. Forest Service (Forest Service), Department of Agriculture, recommended the initiation of a Government contest of these four claims based on a report of a mineral examination conducted by Forest Service Mining Engineer Rodney T. Lentz. In this letter, the Director stated:

> The Forest Service is also informed and believes that the claimants are over 21 years of age, that they are the only parties of interest, and that the claimants' addresses are:
>
> W.L. Campbell and Magma Mining Company
> P.O. Box 13277
> Spokane, WA 99213
>
> Robert D. McGoldrick and Full Moon Mining and Exploration Company
> West 502 29th Avenue
> Spokane, WA 99203

The lead case file (OR MC 26511) contains a copy of a conversation record dated February 28, 1986, between Luke Konantz, an employee of the Forest Service, and Dean Delavan, an employee of the BLM State Office, as to the ownership of the claims. In relevant part, this record provides:

> Mr. Konantz and I discussed the ownership of the claims. He said the USFS used the BLM records to determine Magma Mining as the record owner. W. L. Campbell is somehow linked to Magma.

1/ This same address appeared on the cover letter, on the proof of labor, and on the map of the claims.

Mr. McGoldrick claims to have the 4 claims leased. Mr. Konantz said he would send us a copy of the deed transferring the Tedrow interest to Magma Mining.

On April 7, 1986, BLM, initiated contest proceedings against these claims on behalf of the Forest Service by issuing a formal complaint which alleged that valuable minerals had not been found within the limits of the mining claims sufficient to constitute a discovery of a valuable mineral deposit and that the land was nonmineral in character. The complaint further advised that if no answer to the complaint was filed within 30 days of its receipt, the allegations of the complaint would be taken as admitted. The listed owners of the claims were McGoldrick, Full Moon, and Magma. The only address included on the complaint was that of McGoldrick. Individual copies of the complaint were sent to McGoldrick's address and McGoldrick signed for receipt of all three copies on April 9, 1986.

On April 10, 1986, the District Ranger provided BLM with a copy of a mining deed from Tedrow to Magma, dated May 3, 1974. This deed contained an address for Magma as Box 13444, Spokane, Washington 99213.

On April 11, 1986, BLM received a "Request for Production of Documents and Things," filed by McGoldrick as attorney for himself and Full Moon, in which he requested access to written reports and communications concerning these mining claims, as well as a copy of 43 CFR Part 4, Subpart E, which had apparently been inadvertently omitted from the envelope containing the contest complaint. 2/

By letter dated April 21, 1986, the Acting Chief, Branch of Land and Minerals Operations, informed McGoldrick that, except for any item which might fall within the purview of the Privacy Act, the documents within BLM's possession could be reviewed during regular office hours at the State Office and that a similar procedure would apply with respect to documents within the possession of the Forest Service. Enclosed with this letter was a copy of 43 CFR Part 4, Subpart E.

On June 23, 1986, appellants filed an answer to the contest complaint generally denying the charge of invalidity and stating that the address of Magma as stated in the complaint was not correct. By decision dated October 13, 1987, the State Office declared the interests of McGoldrick, Full Moon, and Magma in the claims null and void. 3/ All three copies of this decision were sent to the same address that had been used when the

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2/ While not required by regulation, the BLM practice is to include a copy of 43 CFR Part 4, Subpart E, the regulations relating to the Department's procedural requirements, as a courtesy to a contestee when it issues a contest complaint.

3/ We would note that normally the proper procedure, since a mining con-test is considered to be a quasi in rem proceeding, would be to declare the claims invalid, not the specific interests of putative or possible claimants. It seems likely, however, for reasons discussed infra in the text of this decision, that the State Office was concerned as to the validity of its service of Magma.

contest complaints were served. This time, McGoldrick signed the return receipt cards for himself and for Full Moon. The return receipt card for Magma was signed by one J. P. Bartleson, a stranger to the record. On November 13, 1987, McGoldrick filed the instant appeal on behalf of him-self and Full Moon.

On appeal to this Board, appellants argue generally that the procedures utilized by the State Office violated due process of law, contending that BLM "refused to make discovery and wholly neglected to set that matter for hearing and determination." They assert that the October 13, 1987, decision violated unspecified constitutional requirements because it contained no findings or conclusions of law. Finally, they contend that BLM knew that Magma had no notice of these proceedings.

[1] Appellants' first two contentions can be quickly disposed of. As is clear from our review of the facts of record, BLM timely and cor-rectly responded to appellants' request for a review of documents. Noth-ing in BLM's response purported to extend the time for the filing of an answer to the contest complaint nor did anything in appellants' "Request for Production of Documents and Things" even seek such an extension. Both the contest complaint and the applicable regulations, 43 CFR 4.450-7(a), expressly advised appellants that if an answer were not filed within 30 days the allegations of the complaint would be taken as admitted and the case would be decided without a hearing. The failure to timely file an answer is not waivable, even where the answer is filed 1 day late. See, e.g., Sainberg v. Morton, 363 F. Supp. 1259 (D. Ariz. 1973). As the court in Sainberg noted, "The regulations would be a farce if they could be applied only if and when the parties felt like complying therewith." Id. at 1263. Appellants clearly failed to timely file an answer to the contest complaint, as a result of which the allegations made therein must be taken as admitted.

By recounting that appellants had failed to timely file an answer to the complaint and that the allegations therein must be taken as admitted, BLM made all of the findings necessary to support its determination of invalidity. The complaint alleged that the mining claims were not supported by a discovery of a valuable mineral deposit and were located on land nonmineral in character. Since it is axiomatic that a mining claim not supported by a discovery and located on nonmineral land is null and void, the determination of invalidity with respect to the instant claims necessarily flows from the failure of appellants to timely contravene the charges in the contest complaint.

Appellants' last argument, however, is considerably more problematic. In light of the tangled factual situation with respect to service on Magma, this Board, by Order of April 13, 1990, requested that McGoldrick submit a sworn affidavit stating that he "is not and was not at the time of service of the complaint either an owner, officer, or agent of, or attorney for Magma Mining Company." This Order further provided that "[i]f McGoldrick denies acting in the capacity of either an officer, agent, owner, or attorney for Magma Mining Company, he should explain under what authority he signed the return receipt card addressed to Magma with the restriction that it be delivered only to the addressee."

McGoldrick's response was received on May 17, 1990. In pertinent part, his affidavit reads as follows:

> The Full Moon Mining and Exploration Co. is the Lessee of the above unpatented mining claims by virtue of a lease agreement dated April 28, 1976, wherein the Magma Mining Co. is the Lessor. The Full Moon Mining Co. has done the annual assessment work since that date and, from time to time, renewed its lease with Magma. * * *
>
> Other than to meet the lease requirements, I have never represented the Magma Mining Co. for any purpose. Beyond my acquaintance with the president thereof I have no knowledge of any of the activities of Magma Mining Co. * * *
>
> My office, like many others, does receive a great deal of mail, some certified. I do not presently recall signing for the documents but in any case I was not authorized and do not accept service for any client. There is no excuse for not sending Magma's complaint to Magma. It[s] address was of record. [4/]

Attached to the affidavit were a number of documents including one which gave Magma's address in March 1986 as P.O. Box 13324, Spokane, Washington 99213.

A key question in ascertaining whether or not Magma had been properly served would involve determining whether the contest complaint had been sent to Magma's address of record and, indeed, whether any address was of record. As the chronology set forth above shows, the Forest Service provided BLM with one address (Box 13277) in its letter of September 19, 1985, and another address (Box 13444) in its letter of April 10, 1986. Neither
of these addresses corresponds to the address provided by McGoldrick with his affidavit. No one with authority to act on behalf of Magma or any other party of record, however, ever filed an address with BLM other than the original McGoldrick address which was the address to which all three copies of the complaint were transmitted. Thus, it is at least arguable that transmission of Magma's copy of the complaint to McGoldrick's address constituted compliance with the service requirements of 43 CFR 1810.2(b) and 4.422(c). 5/

4/ Appellant McGoldrick also stated that he "did not recall if there was but one mailing? Again, I would like to see the return receipt." As noted in the text, there were, in fact, three separate mailings and McGoldrick's signature clearly appears on all three cards.

5/ Indeed, since the applicable recordation regulation required that the owner's name and current address, if known, be contained in the recorda-tion submission (see 43 CFR 3833.1-2(c)(2) (1979)), and since virtually every document submitted contained McGoldrick's name and address, includ-ing the annual proofs of labor, BLM was well within reason in concluding that McGoldrick's address was the "last address of record" for purposes of effecting service on Magma. See, e.g., Victor M. Onet, Jr., 81 IBLA 144 (1984).

The fact that the Forest Service, on its own volition, provided two addresses for Magma would not necessarily compel a contrary result. In Victor M. Onet, Jr., supra, a third party provided an address for a geothermal lease applicant after BLM had been unable to contact the applicant at the address which had been provided on his application. BLM subsequently transmitted the lease forms to the second address where they were accepted by someone other than the applicant. When the lease forms were not timely executed, BLM rejected the application. Upon timely appeal, this Board reversed. The Board expressly held that, for the purposes of 43 CFR 1810.2(b), which governs BLM communications by mail, only the applicant or his duly authorized agent could change the last address of record. Concluding that, however solicitous BLM's actions may have been, the fact remained that BLM had failed to send the lease forms to the "last address of record," the Board held that it had no choice but to reverse the deci-sion rejecting the application since proper service had not been effected. Application of this principle would clearly support BLM's actions in the instant case.

Admittedly, 43 CFR 3833.5(d) expressly provides that only those individuals who have recorded claims, filed notices of transfer of a claim, or whose names appear on annual filings need be served a copy of the contest complaint. In rejecting a challenge to an earlier version of this regulation which failed to make express provision for the notification of individuals whose names appeared on annual filings, the District Court in Topaz Beryllium Co. v. United States, 479 F. Supp. 309 (1979), aff'd, 649 F.2d 775 (D. Ariz. 1981), noted that "The Secretary concedes that if a new owner is identified as such on one of the required annual filings, his failure to file a notice of transfer would not authorize the government to forego giving him notice of a contest." Id. at 316. This regulation was subsequently amended to expressly provide for such notification. See 47 FR 56307 (Dec. 15, 1982). But, while the regulation does, as amended, expressly provide for notification of such individuals, it also mandates that such notification be provided at "their last address of record." It is, as indicated above, certainly arguable that the only "address of record" for any party is the address to which BLM sent all three copies of the contest complaint, i.e., McGoldrick's address.

[2] We need not, however, in the context of the present appeal, decide this question. Regardless of whether or not Magma's interest might be deemed invalidated by the proceedings below, it is clear that appellants have no standing to raise this issue in their appeal. Appellant McGoldrick has affirmatively alleged that he does not represent Magma. The law is well settled that, even if a Government contest complaint fails to name all of the parties in interest, it is not subject to dismissal for that reason and a determination made pursuant thereto is sufficient to bind the parties properly served. See United States v. Prowell, 52 IBLA 256 (1981); 43 CFR 4.450-2(b). Since appellants herein expressly disclaim any representative capacity with respect to the interests of Magma, they are forestalled from arguing that the alleged failure to serve Magma compels reversal of the BLM determination with respect to either their own interests or those of Magma. The failure, even were it established, to properly serve Magma would have no effect on the efficacy of the decision below with respect to appellants'

interests. While it might invalidate BLM's decision with respect to Magma's interests, 6/ only Magma, or its duly authorized representative, would have standing to raise that argument. Accordingly, we conclude that insofar as McGoldrick and Full Moon are concerned, the decision below correctly held that their interests, if any, in the claims were null and void.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision of the Oregon State Office is affirmed as modified.

James L. Burski
Administrative Judge

I concur:

Bruce R. Harris
Administrative Judge

6/ Moreover, in addition to showing that it did not have constructive or actual knowledge of the contest complaint, Magma would also be required to show that it did not receive constructive or actual service of the decision declaring its interest in the claims null and void. Thus, if Bartleson, who signed for the Oct. 13, 1987, decision under review, was a duly authorized agent for Magma, Magma received constructive service of that decision and would be barred by 43 CFR 4.410 from challenging it before the Board.